JD(ATL)–33–04
Shelbyville, IN

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

SHARES, INC.

and **CASE 25–CA–28771**

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW

Michael Beck, Esq. and Frederic D. Roberson, Esq.,
for the General Counsel.
Richard J. Swanson, Esq. (Macey Swanson and Allman),
of Indianapolis, IN, for the Charging Party
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of Shelbyville, IN, for the Respondent

BENCH DECISION AND CERTIFICATION

Statement of the Case

KELTNER W. LOCKE, Administrative Law Judge: I heard this case on May 3 and 4, 2004 in Indianapolis. After the parties rested, I heard oral argument, and on May 6, 2004, issued a bench decision pursuant to Section 102.35(a)(1) of the Board's Rules and Regulations, setting forth findings of fact and conclusions of law. In accordance with Section 102.45 of the Rules and Regulations, I certify the accuracy of, and attach hereto as "Appendix A," the portion of the transcript containing this decision.[1] The Remedy Conclusions of Law, Order and Notice provisions are set forth below.

[1] The bench decision appears in uncorrected form at pages 432 through 456 of the transcript. The final version, after correction of oral and transcriptional errors, is attached as Appendix A to this Certification.

Uncontradicted evidence establishes that Shares, Inc. created WAP, Inc. and WAP, LLC, for accounting and tax purposes, to separate its for–profit operation from its non–profit divisions. The record further establishes that neither WAP, Inc. nor WAP, LLC has any employees and that Shares, Inc. is the employer of the employees at issue in this proceeding. I have amended the case caption accordingly.

Appropriate Unit

As discussed in the bench decision, Respondent is a not–for–profit corporation which employs and trains individuals with disabilities. When one of its customers went bankrupt, Respondent decided to buy this customer's machinery and to begin manufacturing one of this customer's products: Glow plugs for diesel engines.

Respondent hired 11 employees to perform this manufacturing and began making glow plugs on Monday, April 28, 2003. Of the 11 employees making glow plugs, 7 had been doing similar work for the customer on April 25, 2003 and another 3 had previously worked for this customer before being laid off.

These employees made the glow plugs on the equipment which Respondent had purchased from the customer, Wellman Automotive Products, Inc., which remained at the Wellman facility. In the bench decision, I found that these 11 workers constituted a substantial and representative complement, and that on April 28, 2003 Respondent became a successor to Wellman pursuant to ***NLRB v. Burns Security Services***, 406 U.S. 272 (1972).

For four months, these employees continued to make glow plugs at Wellman's former factory, located at One Progress Road in Shelbyville, Indiana. About September 1, 2003, Respondent moved these glow plug employees to a new facility at 705 Mausoleum Road, Shelbyville, Indiana,

At the time they moved to the Mausoleum Road facility, these bargaining unit employees were the only production and maintenance employees who worked there. In January 2004, Respondent began another operation, sometimes called "Ryobi Die Cast," in the same building. This new operation brought about 40 employees to the Mausoleum Road facility.

The Ryobi Die Cast employees do not make glow plugs but rather sandblast, polish and deburr parts produced by die casting. Although working in the same building, the glow plug employees and the Ryobi Die Cast employees are in separate divisions. The glow plug employees work in a for–profit division of Respondent, but the Ryobi Die Cast employees work in a not–for–profit division. (About 30 percent of the Ryobi Die Cast employees have disabilities.)

The glow plug employees and the Ryobi Die Cast employees work under different supervisors and are paid different hourly rates.

Two glow plug employees have transferred to other divisions of Respondent, but the record suggests that no glow plug employee has transferred permanently into the Ryobi Die Cast Division. One glow plug employee did transfer to the Ryobi operation but then transferred back. Respondent's General Manager, James Leugers, testified that "we haven't had people come from the Ryobi Die Cast to work on the glow plugs."

Considering that the Ryobi Die Cast employees and the glow plug employees work in different divisions for different wage rates and with different supervisors, and further considering that there has been no significant transfer of employees between the two divisions, I conclude that these two groups of employees do not share a community of interest.

Additionally, considering that only the glow plug employees work in a for–profit division of Respondent, and that all other employees of Respondent except the Ryobi Die Cast employees work at different locations, and further considering that the glow plug employees are separately supervised and receive different compensation, I find that the glow plug employees do not share a community of interest with any other employees of Respondent.

However, they do share a community of interest with each other. Therefore, I find that the following employees constitutes a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act:

> All production and maintenance employees of Shares, Inc., who are engaged in the manufacture of glow plugs at the 705 Mausoleum Road, Shelbyville, Indiana facility, EXCLUDING all office clerical employees, guards, professional employees, and supervisors as defined in the Act.

For the reasons stated in the bench decision, I conclude that Respondent has an obligation to bargain with the Union as the exclusive representative of the employees in this unit.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act, including posting the notice to employees attached hereto as Appendix B.

Further, I recommend that the Board order Respondent to recognize and bargain with the Union as the exclusive representative of the employees in the unit described above.

CONCLUSIONS OF LAW

1. Shares, Inc., WAP, Inc., and WAP, LLC constitute a single employer, herein called Respondent.

2. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

3. The Charging Party, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, is a labor organization within the meaning of Section 2(5) of the Act.

4. The following employees constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act:

> All production and maintenance employees of Shares, Inc., who are engaged in the manufacture of glow plugs at the 705 Mausoleum Road, Shelbyville, Indiana facility, EXCLUDING all office clerical employees, guards, professional employees, and supervisors as defined in the Act.

5. Since April 28, 2003, the Charging Party has been the exclusive representative, within the meaning of Section 9(a) of the Act, of the employees in the unit described in paragraph 3, above.

6. Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to recognize and bargain with the Charging Party as the exclusive representative of the employees in the unit described in paragraph 3, above.

7. The unfair labor practices described in paragraph 5, above, are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

8. Respondent did not engage in any unfair labor practices alleged in the Complaint not specifically found herein.

On the findings of fact and conclusions of law herein, and on the entire record in this case, I issue the following recommended[2]

ORDER

The Respondent, Shares, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from:

(a) Failing and refusing to recognize and bargain with the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, as the exclusive representative of the employees described above in paragraph 3 of the "Conclusions of Law."

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights to self–organization, to form, join, or assist any labor organization, to bargain collectively through representatives of their own choosing, or to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

[2] If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, these findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board, and all objections to them shall be deemed waived for all purposes.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Recognize and bargain with International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, as the exclusive representative of the employees described above in paragraph 3 of the "Conclusions of Law."

(b) Within 14 days after service by the Region, post at its facilities in Shelbyville, Indiana, copies of the attached notice marked "Appendix B."[3] Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent in the bargaining unit at any time since April 28, 2003.

Dated Washington, D.C.

Keltner W. Locke
Administrative Law Judge

[3] If this Order is enforced by a judgment of the United States Court of Appeals, the words in the notice reading **"POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD"** shall read**"POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."**

APPENDIX A

Bench Decision

This decision is issued pursuant to Section 102.35(a)(10) and Section 102.45 of the Board's Rules and Regulations. I find that Respondent violated Section 8(a)(5) and (1) of the Act as alleged in the Complaint.

Procedural History

This case began on June 26, 2003, when the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW filed its initial charge in this proceeding. For brevity, I will call this labor organization the "Union" or the "Charging Party." On November 25, 2003 and on February 27, 2004, the Union filed amended charges.

On October 21, 2003, after an investigation, the Regional Director of Region 25 of the National Labor Relations Board issued a Complaint and Notice of Hearing. On March 30, 2004, the Regional Director issued an "Amended Complaint and Notice of Hearing," which I will refer to simply as the "Complaint."

In issuing and amending this complaint, the Regional Director acted on behalf of the General Counsel of the Board, whom I will refer to as the "General Counsel" or as the "government."

The Complaint caption identified the Respondent as follows: "Shares, Inc. and its alter egos WAP, Inc. and WAP, LLC and/or Shares, Inc., WAP, Inc. and WAP LLC, a single employer." The Complaint alleged that this Respondent had violated Section 8(a)(5) and (1) of the National Labor Relations Act (the "Act") by failing to recognize and bargain with the Union as the exclusive representative of an appropriate unit of Respondent's employees. Respondent filed a timely answer denying these unfair labor practice allegations.

On May 3, 2004, a hearing in this matter opened before me in Indianapolis, Indiana. On May 3 and 4, 2004, the parties presented evidence, and on May 5, 2004, counsel gave oral argument. Today, May 6, 2004, I am issuing this bench decision.

Admitted Allegations

In its Answer, Respondent has admitted the allegations raised in Complaint paragraphs 1(a), 1(b), 1(c), 2(d), 2(e), 2(h), 2(i), 2(j), 3(a), 3(b), and 4, and I find that the government has proven these allegations.

More specifically, I find that the Union filed and served the charge and amended charges as alleged. Further, I find that at all material times, Shares, Inc., which I will call "Shares," has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

Additionally, I find that about May 8, 2003, Shares created Respondent WAP, Inc. as its wholly owned subsidiary, and that about June 30, 2003, Shares created Respondent WAP, LLC, a limited liability company, as its wholly owned subsidiary.

Shares has admitted, and I find, that General Manager James Leugers and Production Supervisor Danny McCoomas are its supervisors and agents within the meaning of Sections 2(11) and 2(13) of the Act, respectively.

I also find that at all material times, the Charging Party has been a labor organization within the meaning of Section 2(5) of the Act. Similarly, I find that at all material times, a local union affiliated with the Charging Party, Local Union No. 1793, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, has been a labor organization within the meaning of Section 2(5) of the Act.

Background

Shares is a not–for–profit corporation which operates a number of industries to employ and train individuals with disabilities. It receives funding from the State of Indiana to perform this educational function.

Apart from government funding, Shares supports its activities by selling the products made by its workforce, which consists of employees with disabilities, called "consumers," and other employees who are called "staff." The staff assist and train the employees with disabilities and sometimes these "consumers" progress enough to become staff. The products they make include die cast aluminum parts, DNA child identification kits, and glow plugs for diesel engines. This case concerns the employees who make the glow plugs.

A glow plug serves much the same purpose in a diesel engine that a spark plug serves in a gasoline engine. There is, however, a significant difference between the two plugs. Although a spark plug must continue to fire as long as the gasoline engine is running, a glow plug has easier duty. When an operator turns on the diesel engine, the glow plug ignites the fuel initially, but once the engine is running, the fuel/air mixture ignites by itself when the piston compresses it. Respondent sells many of its glow plugs to the United States military for use in Humvees.

Until about March 9, 2003, Shares did not manufacture glow plugs. Another company, Wellman Automotive Products, Inc. ("Wellman") made the glow plugs and then sent them to Shares for inspection and packaging. The employees at Shares would return the packages to Wellman for shipment to Wellman's customers. Shares charged Wellman a fee for this service.

The Union represented the Wellman employees who made the glow plugs and other products, which included, at various times, soldering irons, heating elements and furnaces. The Union began representing the employees in this bargaining unit after a Board–conducted election in 1972. At that time, the bargaining unit employees worked for General Electric, which later sold the facility to a predecessor of Wellman.

For three decades, the Union represented the employees in this bargaining unit and negotiated collective–bargaining agreements with their employer. The last of these contracts was effective during the period April 29, 2000 to April 29, 2003.

As Wellman experienced financial difficulties, it stopped making some products and sold the equipment to other companies. On about February 10, 2003, Wellman filed for bankruptcy.

When Wellman declared bankruptcy, it was still producing glow plugs. The bankruptcy court appointed Shares to oversee this manufacturing process, which Wellman employees still performed. Shares began this management function on March 9, 2003. The Wellman employees continued to work at the same place as before, a plant located at One Progress Road in Shelbyville, Indiana. I will refer to it as the "One Progress Road" facility.

Also as before, after the Wellman employees manufactured the glow plugs, they would ship them to Shares' facility located on Miller Street, in Shelbyville, Indiana. I will call it the "Miller Street" facility. As before, Shares' employees inspected the glow plugs, packaged them, and returned them to the Wellman facility for delivery to customers.

This arrangement, with Shares' management supervising the Wellman workforce, continued from March 9, 2003 to approximately April 28, 2003. During this period, Shares also took steps to buy Wellman's machinery and lease its plant, so that Shares could begin making and selling glow plugs.

Because Wellman was in bankruptcy, Shares needed approval from the bankruptcy court before it could consummate this purchase. On April 25, 2003, the Hon. James K. Coachys, Judge of the United States Bankruptcy Court, signed an order authorizing the transaction.

After Wellman sold its equipment, of course, it could no longer make glow plugs and had no reason to employ the people who did this work. On about April 25, 2003, Wellman discharged these employees. However, seven of them suffered little if any loss of work. Shares hired these employees to continue making glow plugs with the same equipment in the same plant. They were back at their machines on April 28, 2003.

Shares also hired three other Wellman employees who were on layoff status but who possessed recall rights under the collective–bargaining agreement. Based on General Counsel's Exhibit 2, an employee list, I find that on the day after Shares began manufacturing glow plugs, 11 of its employees were performing this work. As already noted, seven of the 11 had been working in the Wellman bargaining unit the previous week, and they continued the work they had been doing: Making glow plugs to supply to the United States government.

General Counsel's Exhibit 2, the list of glow plug production employees at work on April 29, 2003, is consistent with the testimony of General Manager James H. Leugers, who described how many employees were engaged in making glow plugs the previous day, April 28th. According to Leugers, 11 employees were making glow plugs on that day, and 7 of them previously had worked for Wellman.

Leughers added that on this same day, 25 Shares employees were inspecting and packaging glow plugs. They were not doing this work at the Progress Road location but rather at Shares' facility on Miller Street. At this point, therefore, nothing had changed about where the work took place. Employees, now working for Shares, continued to make glow plugs at the Progress Road facility and other employees still inspected and packed them at the Miller Street facility.

Also on April 29, 2003, the Union's 3–year collective–bargaining agreement with Wellman expired. As the representative of Wellman's production employees, the Union had participated in the bankruptcy proceeding and had learned about Wellman's sale of assets to Shares. On May 9, 2003, a representative of the International Union, John Messer, sent a letter to Shares General Manager James Leugers. This letter stated, in part, as follows:

> We have been informed through bankruptcy sale that Shares Corporation has purchased Wellman Thermal Automotive Systems.
>
> A majority of the employees hired by Shares Corporation are former Wellman Thermal System Corporation employees and members of the UAW Local 1793 bargaining unit. As a successor to Wellman Thermal Systems Corporation, Shares Corporation has an obligation to bargain with the International UAW and its Local 1793 regarding the terms and conditions of employment at Shares Corporation's Shelbyville, Indiana location.
>
> Please contact me at (317) 247–5515 to arrange a mutually agreeable time to begin bargaining.

One of Shares' attorneys, Stephen Schrumpf, replied by letter dated May 22, 2003. This letter disputed that Shares was Wellman's successor and stated, in part, as follows:

> I must decline your invitation, and notify you that the Company will not recognize the U.A.W. I note in your letter that you believe that Shares is a "successor" to the former Wellman Thermal Systems, Inc. Please be advised that Shares purchased only a portion of the assets of Wellman Thermal Systems, Inc.
>
> As you know, the assets were purchased in a bankruptcy proceeding, and all creditors, including the U.A.W., are subject to the Orders issued by the Bankruptcy Court. As a creditor, the U.A.W. actively participated in the bankruptcy proceeding, and did not object to the sale of certain assets to Shares. . .
>
> Accordingly, I would direct your attention to the Order regarding the sale of assets to Shares. It is quite specific in that Shares is not to be considered, in any regard, the successor of Wellman. . .As such, I believe this finding is conclusive on the question of successorship. . .

The record establishes that Shares has not, at any time, recognized or bargained with the Union. As already noted, the Union filed its unfair labor practice charge in this matter of June 26, 2003.

Meanwhile, Shares' new business was increasing as management reached out to Wellman's former customers and tried to attract new customers as well. Gradually, Shares' efforts to cultivate a customer base succeeded.

It appears that Shares picked a good time to start making glow plugs. When the United States invaded Iraq, Humvees carried many of the troops, and these diesel–powered vehicles could not start without glow plugs. Demand for the product accelerated.

But in one sense, the growing market for glow plugs put Shares in a somewhat awkward position. It was a not–for–profit corporation, but making glow plugs was surprisingly profitable.

Unless Shares took steps to keep its non–profit and for–profit operations distinct, the Internal Revenue Service might reconsider Shares' tax–exempt status.

Shares' management decided to address this problem by incorporating a for–profit subsidiary to manufacture the glow plugs. Shares first created a Subchapter S corporation, WAP, Inc. However, management then decided that it would be better to operate the for–profit subsidiary as a limited liability company, so Shares created WAP, LLC. to replace WAP, Inc.

It appears that the initials "W–A–P" refer to Wellman Automotive Products but Wellman had no financial interest in these companies. To the contrary, at all material times both WAP, Inc. and WAP, LLC have been subsidiaries wholly owned by Shares.

At hearing, Respondent left no doubt that Shares' management runs the glow plug operation and employs the workers who make the glow plugs. The record establishes that neither WAP, Inc. nor WAP, LLC employs any workers. Rather, these employees work for, are supervised by, and receive their compensation from Shares.

As already noted, 2003 was a boom year for glow plugs. To meet the demand, Shares management located a site on Mausoleum Road in Shelbyville, equipped a plant, and moved the glow plug production workers into it around September 1, 2003. The employees continued to do essentially the same work – making glow plugs – but at this new location, which I will call the "Mausoleum Road" facility.

The employees at the Mausoleum Road facility continued to ship their product to the Miller Street location to be inspected and packaged. Many of the workers performing these tasks have disabilities which limit their work performance and Shares classifies such employees as "consumers" rather than "staff."

Management assesses the productivity of each "consumer" and adjusts his or her pay rate based on this assessment. A "consumer" who is less productive than a "staff" member without a disability receives a lower hourly wage. The production employees making glow plugs at the Mausoleum Road plant do not have such disabilities and Shares does not classify them as "consumers." Additionally, Shares does not adjust the hourly wage rates of these glow plug production employees as it does for the "consumers" working at Miller Street.

At the time they moved into the new Mausoleum Road facility, the glow plug production workers were the first to work there. Four months later, in January 2004, Shares placed other workers in this same building. However, these latter employees perform work related to die casting and generally are not involved in glow plug manufacture.

As of April 30, 2004 – one year and two days after Shares began manufacturing glow plugs – the number of workers engaged in such production had grown from 11 to 19. The General Counsel asserts that Respondent has violated and continues to violate the Act by failing and refusing to recognize the Union as the exclusive collective–bargaining representative of these employees.

The Analytical Framework

The Complaint presents several issues which must be resolved. The first, and simplest, concerns Respondent's status as an employer.

In the Complaint, the government alleges that Shares, W.A.P., Inc. and W.A.P., LLC constitute a single employer or, alternatively, that W.A.P., Inc. and W.A.P., LLC are alter egos of Shares. Uncontradicted evidence makes these allegations unnecessary. The record establishes that Shares created W.A.P., Inc. and W.A.P., LLC as its wholly owned subsidiaries for accounting and tax purposes, and that neither of these two subsidiaries employs anyone. Both Shares' attorney and management officials stated unequivocally that Shares alone is the employer of the glow plug production workers. I so find.

The central dispute in this proceeding concerns whether Shares has a duty to recognize the Union as the representative of these employees. That question turns, in part, on whether Shares is a successor to Wellman within the meaning of the Supreme Court's decision in ***NLRB v. Burns Security Services***, 406 U.S. 272 (1972). Deciding that question requires consideration of a number of factors.

A temptation sometimes arises to truncate the analytical process and resolve the successorship issue simply by looking at the workforce the purchaser hired into presumed bargaining unit positions and then determining whether a majority of these employees came from the seller's bargaining unit. Although such a calculation is important, it is not the whole story. To do justice to the process – and to do justice *with* the process – it may be helpful to begin with an overview of the legal principles.

In general, a "purchasing employer is required to recognize and bargain with a union representing the predecessor's employees when there is 'substantial continuity' of operations after the transaction and if a majority of the new employer's work force, in an appropriate unit, consists of the predecessor's employees when the new employer has reached a 'substantial and representative complement'." ***Dattco, Inc***., 338 NLRB No. 7 (September 27, 2002).

Some of these terms, however, need further clarification. For example, to meet the definition of "purchasing employer," a company does not have to take over all of a predecessor's business. Similarly, an employer can become a ***Burns*** successor without continuing to employ all the job classifications in the predecessor's bargaining unit.

The Board has frequently found substantial continuity where the successor employer has taken over only a discrete portion of the predecessor's heterogeneous bargaining unit. See ***Van Lear Equipment***, 336 NLRB No. 114 (November 26, 2001), citing ***Bronx Health Plan***, 326 NLRB 810 (1998), enfd. 203 F.3d 51 (D.C. Cir. 1999); ***M.S. Management Associate***, 325 NLRB 1154 (1998), enfd. sub nom. ***NLRB v. Simon DeBartelo Group***, 241 F.3d 207 (2d Cir. 2001); ***Lincoln Park Zoological Society***, 322 NLRB 263 (1996), enfd. 116 F.3d 216 (7th Cir. 1997); ***Louis Pappas' Homosassa Springs Restaurant***, 275 NLRB 1519 (1985); and ***Stewart Granite Enterprises***, 255 NLRB 569 (1981).

In labor law parlance, when the Board decides whether the bargaining unit has survived the transition from seller to buyer, it is making a "continuity determination." In ***N.K. Parker Transport, Inc***., 332 NLRB No. 54 (September 29, 2000), the Board summarized this analytical process as follows:

> In making a "continuity" determination, the Board looks to whether (1) there has been substantial continuity of business operations; (2) the new employer uses the same plant with the same machinery, equipment and production methods; and (3) the same or substantially the same employees are used in the same jobs under the same working conditions and supervisors to produce the same product or provide the same service. This approach is primarily factual in nature and is based on a consideration of the totality of the circumstances in any given situation.

Following this analytical framework focuses the decision process on the factors identified by the Supreme Court in ***Fall River Dyeing Corp. v. NLRB***, 482 U.S. 27 (1987). The Board must consider

> [W]hether the business of both employers is essentially the same; whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors; and whether the new entity has the same production process, produces the same products and has basically the same body of customers.

Fall River Dyeing Corp. v. NLRB, above, 482 U.S. at 41–43.

Moreover, to find that an employer is a ***Burns*** successor, obliged to recognize and bargain with a union, there is one other prerequisite. The affected employees must comprise a unit appropriate for collective bargaining. For example, in the ***Dattco*** decision, the Board reversed the administrative law judge's decision that the Respondent was a ***Burns*** successor. "Although the judge analyzed most of the successorship factors," the Board wrote, "he did not independently assess the appropriateness of the unit." The Board stressed that each case must be addressed on its own facts. In this instance, the Board concluded that the unique facts overcame the presumption that a single facility bargaining unit was appropriate. ***Dattco, Inc.***, 338 NLRB No. 7.

In considering these issues, I will address first the question of continuity. Should I find that there was a substantial continuity of operations, I will go on to examine the bargaining unit alleged in the Complaint to determine whether it is an appropriate unit for collective bargaining within the meaning of Section 9(b) of the Act.

The Continuity Issue

In arguing that there has been no substantial continuity of business operations, Respondent has not quite depicted the glow plug employees as a small lifeboat of survivors escaping a sinking ship. However, its argument might be cast in such terms. Rather than boarding the sinking ship, patching it up, bailing out the water and continuing on to the ship's intended destination, Respondent simply salvaged some of the ship's equipment, took the survivors off the lifeboat and hired them to help Respondent's own ship get to Respondent's chosen destination.

To buttress this argument, Respondent contends that even before it hired the former Wellman employees, it was engaged in its own glow plug manufacturing operation. After all, the work done by the employees at Respondent's Miller Road facility – inspecting the glow plugs and packaging them – is part of the manufacturing process. In oral argument,

Respondent's counsel noted pointedly that even a Union official had agreed that manufacturing glow plugs includes inspecting and packing them.

Thus, Respondent had already set sail to be a glow plug maker so when it actually began making the glow plugs, using Wellman's former equipment and Wellman's former employees, it was simply continuing on its own planned course, and not on Wellman's. Respondent's counsel noted pointedly in oral argument that Wellman had lost most of its glow plug customers and, at the time Respondent hired the Wellman employees, they were finishing the last work for Wellman's last customer. In other words, Respondent contends that it built its own glow plug manufacturing operation from scratch.

In terms of the lifeboat analogy, Respondent appears to be arguing that the handful of Wellman employees did not bring a business operation with them in the lifeboat. Instead, they brought only themselves and, when they boarded Respondent's ship, they merged into Respondent's large crew. This crew outnumbered the Wellman survivors by a factor of perhaps 10 to 1, depending on exactly which crew members were counted. Therefore, Respondent argues, there is no logical way to conclude that Wellman's business operation continued.

Respondent's argument is persuasive only to someone looking at the facts from a certain viewpoint, the bridge of Respondent's ship. It does not have as much force when viewed from other perspectives. During oral argument, in fact, Respondent asserted that "The problem that General Counsel and Charging Party have here is that they don't want to look at this from the perspective of how Shares runs their operation."

At another point during oral argument, discussing the appropriate unit issue, Respondent stated as follows:

> You don't look at this case from the perspective of Wellman and what was Wellman because Wellman ceased to exist, essentially, on the 25th of April. Their bargaining obligation expired on the 29th of April 2003. Their assets were sold on the 28th of April 2003. Their employees were terminated on the 25th of April 2003. Therefore, Wellman and its relationship with the Union should not be the issue before us today. The issue before us today is Shares. What was the Shares corporation and what did the Shares corporation do which brought this charge from the NLRB?

Notwithstanding Respondent's invitation to view the facts from its perspective, I must assume the vantage point mandated by the Board and the Supreme Court. In ***Van Lear Equipment***, 336 NLRB No. 114 (November 26, 2001), the Board quoted the factors which the Supreme Court identified in ***Fall River Dyeing Corp.,*** above, and then continued as follows:

> These factors are assessed primarily from the perspective of the employees, that is, "whether 'those employees who have been retained will . . . view their job situations as essentially unaltered.'" [*Fall River Dyeing Corp.*] Id., quoting ***Golden State Bottling Co. v. NLRB***, 414 U.S. 168, 184 (1973).

Therefore, I will try to see the facts through the eyes of one of the 7 employees who were working for Wellman on Friday, April 25, 2003 and for Respondent on Monday, April 28, 2003.

On the worker's last day of employment with Wellman, he was making glow plugs using machines at a plant located at One Progress Road in Shelbyville, Indiana. He left work that day, a Friday, and returned on Monday to the same facility, where he used the same machines to make the same product for the same customer. Moreover, the same supervisors who had been in charge of the process on Friday continued to supervise it on Monday.

Thus, from the perspective of this employee, he and his fellow workers were doing the same jobs in the same working conditions and under the same supervisors, using the same production process to make the same product for the same customer. Seeing the facts through this employee's eyes, I would conclude that all of the *Fall River Dyeing* criteria have been satisfied.

As the Board stated in ***Harter Tomato Products Company***, 321 NLRB 901 (1996), "When the employees work in the same plant using the same equipment and production processes, consideration of who technically owns the property used would not likely influence the employees' sense of continuity in the enterprises."

It is true that several months later, Shares relocated the glow plug employees to a new facility on Mausoleum Road, in Shelbyville. However, this later move changes little. From time to time, many employers relocate their facilities as their needs change.

Having concluded that there has been a substantial continuity of business operations, I will now consider the appropriate unit issue. Respondent asserts that the former Wellman employees had been integrated into a much larger operation and that a unit consisting solely of these workers would be inappropriate. My analysis will be guided by the following principles.

In ***Van Lear Equipment***, above, the Board, citing ***New Britain Transportation Co.***, 330 NLRB No. 57 (1999), reiterated that single–location units are presumptively appropriate. Additionally, as the Board stated in ***Brown & Root, Inc.,*** 334 NLRB No. 96 (July 19, 2001), "The issue is not whether a new unit consisting of both of the Respondent's work forces at CIBA would be appropriate, but whether the original unit remained a separate appropriate unit after the successorship took effect. e.g., ***Heritage Park Health Care Center***, 324 NLRB 447, 451 (1997), enfd. 159 F.3d 1346 (2d Cir. 1998)."

In the present case, the glow plug production employees continued to work for several months at the facility on Old Progress Road where they did not come into frequent contact with Respondent's other employees, who worked at other locations. Because of their separate location, the glow plug production employees did not have the same immediate supervisors as other employees of Respondent.

Even when Respondent relocated these employees to the new facility on Mausoleum Road, they continued to work apart from other employees. Finally, in early 2004, another group of Respondent's employees also began working at the Mausoleum Road plant, but they performed different work and had little interchange with the glow plug employees.

Respondent contends that a unit of these glow plug production workers, which excluded the employees who inspected and packaged the glow plugs, would not be appropriate. However,

the latter employees work at a different location – the Miller Street facility, under different supervision and different circumstances.

To a large extent, the employees performing the inspecting and packaging work at the Miller Street location have disabilities which affect their ability to work and the compensation they earn. Respondent, acting as a not–for–profit organization, employs these individuals to train them to be – to paraphrase the words of Respondent's counsel – productive members of society. Thus, with respect to these individuals, whom it calls "consumers," Respondent's goal is essentially educational.

On the other hand, the glow plug production employees who worked first at One Progress Road and later at the Mausoleum Road facility, do not need further training either in how to function in the workplace or how to perform their specific jobs. Respondent does not modify their wage rates to compensate for lower productivity and Respondent's objective is not to train them. Rather, with these workers, Respondent's objective is to make a profit.

Indeed, of all Respondent's operations, this glow plug manufacturing line is the only one which Respondent runs to make a profit. At a fundamental level, this fact makes the relationship between management and the glow plug production employees quite different from management's relationship with other workers. To most of its employees, Respondent's supervisors are teachers and mentors who spend government grants to create a learning situation. To the employees on Respondent's for–profit glow plug manufacturing line, a supervisor is the boss.

The unique status of the glow plug production employees gives them a community of interest not shared by other workers. Therefore, considering their separate work environment, their separate supervision, the differences in compensation and Respondent's separate, for–profit objective in employing them, I conclude that the collective–bargaining unit described in the Complaint is an appropriate one for collective bargaining within the meaning of Section 9(b) of the Act.

When Respondent began making glow plugs on April 28, 2003, it hired 11 employees to do the work. Seven of these employees had been doing the same work for Wellman only 3 days earlier, and another three had worked for Wellman but were on layoff status. Even disregarding these three laid–off workers, the other 7 Wellman employees constitute a clear majority of the 11–person bargaining unit.

One year and two days later, on April 30, 2004, Respondent employed 19 persons to manufacture glow plugs. In other words, the bargaining unit had grown from 11 to 19. Based upon this rate of increase, I conclude that as of April 28, 2003, Respondent already had hired a representative complement of its workers.

In these circumstances, Respondent was a successor to Wellman within the meaning of ***NLRB v. Burns Security Services***, 406 U.S. 272 (1972).

By letter dated May 9, 2003, the Union demanded that Respondent recognize it as the representative of these employees and engage in collective bargaining. Upon receipt of that

demand, Respondent had a duty to bargain. Its failure to do so violated Section 8(a)(5) and (1) of the Act.

Respondent has argued that certain actions by the Bankruptcy Court preclude the Board from finding that it is Wellman's successor and obligated to bargain with the Union. I do not interpret the Bankruptcy Court's actions and order in that way.

As the General Counsel and Charging Party have pointed out, Respondent's bargaining obligation did not arise because it purchased any of Wellman's assets. Rather, the obligation attached because it hired a number of employees who had been working for Wellman in the collective–bargaining unit represented by the Union.

Respondent's own action, unrelated to the transaction approved by the Bankruptcy Court, created the bargaining duty. Therefore, I conclude that it does not fall within the scope of the Bankruptcy Court's order.

Additionally, Respondent may argue that it acted without notice concerning Wellman's relationship with the Union. However, as the General Counsel and Charging Party have pointed out, such notice is not an element of the *Burns* successorship doctrine.

When the transcript of this proceeding has been prepared, I will issue a Certification which attaches as an appendix the portion of the transcript reporting this bench decision. This Certification also will include provisions relating to the Findings of Fact, Conclusions of Law, Remedy, Order and Notice. When that Certification is served upon the parties, the time period for filing an appeal will begin to run.

I have greatly appreciated the professionalism and civility shown by all counsel. The hearing is closed.

APPENDIX B
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize and bargain collectively with International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, as the exclusive representative of the employees in the following appropriate collective–bargaining unit:

All production and maintenance employees of Shares, Inc., who are engaged in the manufacture of glow plugs at the 705 Mausoleum Road, Shelbyville, Indiana facility, EXCLUDING all office clerical employees, guards, professional employees, and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain or coerce our employees in the exercise of these rights, guaranteed to them by Section 7 of the National Labor Relations Act.

WE WILL recognize and bargain with International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW as the exclusive representative of the employees in the unit described above.

SHARES, INC.
(Employer)

Dated: _____ By: _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret–ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

575 N. Pennsylvania Street, Room 238, Indianapolis, IN 46204–1577
(317)226–7382; Hours 8:30 a.m. to 5:00 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (317)226–7413